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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 920

SHIRLEY A. THOMAS, as Administratrix of the Estate of Donald B. Thomas,

and

JOHN F. WYNN, JR.,

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Shirley A. Thomas, as Administratrix of the estate of Donald B. Thomas; and Petitioner John F. Wynn, Jr. pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this action on August 23, 1968.

OPINIONS BELOW

Reprinted as Appendices to this petition, with the letter designations noted, are (A) opinion of the United States

Court of Appeals for the District of Columbia Circuit, reported at 401 F.2d 430; (B) Order and Judgment of District Judge Holtzoff of the United States District Court for the District of Columbia. (C) The order of the Court of Appeals denying petition for rehearing.

JURISDICTION

The judgment of the Court of Appeals was entered on August 23, 1968. A timely petition for rehearing and suggestion for rehearing en banc was denied by the court below by its Order entered on October 10, 1968.

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether a Court of Appeals may constitutionally review the action of a trial court and jury on issue of liability as it relates to a question of fact tried and decided by a jury.

(2) Where the Recreation Board (a District of Columbia Agency) has exclusive control and jurisdiction over a recreation establishment located on Federal property, the entire year round pursuant to the powers vested in the Board by Congress, and assumes the responsibility of operating the recreation establishment except that the operation of the swimming pool located on the premises of the recreation center is effected by an arrangement between the Recreation Board and another party, is the Board chargeable with the duty of exercising reasonable care to maintain the pool in a reasonably safe condition.

(3) Whether a recreation establishment, including its swimming pool, being operated by the Recration Board pursuant to the powers vested in it by Act of Congress is such a public area so as to charge the respondent with the duty of evercising reasonable care in its maintenance.

(4) Whether the Act of Congress, in establishing the office of an electrical engineer with sole authority to inspect and approve electrical devices within the District of Columbia, gives said department authority to inspect and approve electrical devices in federal buildings located in the District.

(5) Whether a trial judge may constitutionally reduce the amount of damages rendered by a jury for the wrongful death of a decedant if the verdict is deemed excessive by the trial judge, other than as as common law.

(6) Whether the District of Columbia is liable for the maintenance of a nuisance upon a recreational facility operated by it.

CONSTITUTIONAL PROVISION

The Seventh Amendment to the Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than acocrding to the rules of the common law."

STATUTES INVOLVED

The Congressional Statute (April 29, 1942, 56 Stat. 261, Ch. 265, D.C. Code 8-201 et seq.) provides as follows:

> *Sec. 8-201. Recreation Board created.*
>
> There is hereby created in and for the District of Columbia a Recreation Board hereinafter referred to as "the Board". (Apr. 29, 1942, 56 Stat. 261, ch. 265)."

"*Sec. 8-208. Determination of general policy—Supervision of expenditures.*

The Board shall determine all questions of general policy relating to public recreation in and for the District of Columbia, and shall supervise and direct expenditure of all appropriations and/or other funds made available to the Board. (Apr. 29, 1942 56 Stat. 262 ch. 265, art. II Sec. 1.)"

§ *8-210. Comprehensive program for public recreation.*

The Board shall have power and authority to adopt, conduct, direct, or cause to be conducted or directed, under its supervision, a comprehensive program of public recreation which shall include the operation and direction of games, sports, arts and crafts, hobby shops, music, drama, speech, nursery play, dancing, lectures, forum for informal discussion, and such other physical, social, mental, and creative opportunities for leisure-time participation as the Board shall deem advisable to offer in major recreation centers, playfields, athletic fields, playgrounds, tennis courts, baseball diamonds, swimming pools, beaches, gold courses, community centers, and social centers in schools, parks, or other publicly owned buildings, as well as other recreational facilities which may be agreed upon between the Board and the agencies having jurisdiction over such facilities. The public properties utilized by the Board for the above purposes shall include those designated by the National Capital Planning Commission, in accordance with a comprehensive plan, as suitable and desirable units of the District of Columbia recreational system.

Nothing in this chapter contained shall be construed as affecting any rights under any existing lease or leases lawfully entered into by any agency mentioned or affected by this chapter, nor shall anything in this chapter contained be construed as affecting the right of any such agency in the future lawfully to enter into leases of land or premises under its control for recreational purposes. (Apr. 29, 1942, 56 Stat. 263, ch. 265, art. II, § 3.)

The Congressional stattue, (Apr. 26, 1904, 33 Stat. 306, ch. 1602) D.C. Code, 1-719, et seq. provides as follows:

§ *1-719. Electric wiring—Inspection—Rules and regulations—Fees.*

The Commissioners of the District of Columbia shall have power to make from time to time such rules and regulations respecting the production, use and control of electricity for light, heat, and power purposes in the District of Columbia not inconsistent with existing laws, as in their judgment will afford safety and convenience to the public; and the Commissioners of said District are further authorized and empowered to prescribe such fees for the examination of the electrical wiring, machinery, and appliances in buildings as they may deem proper, to be paid to the Collector of Taxes of the District of Columbia, and any such rules and regulations shall after promulgation have the effect and force of law: *Provided,* That nothing in sections 1-719 to 1-723 contained shall apply to the power plants or buildings of incorporated companies engaged in the production and distribution of electric current for public service or use. (Apr. 26, 1904, 33 Stat. 306, ch. 1602, § 1.)

§ *1-720. Inspection—Notice of violations—Penalty.*

The electrical engineer who shall be chief inspector of electrical work and his assistants are hereby empowered and required, under the direction of the commissioners, to inspect any building in course of erection and during reasonable hours to enter into and examine any building where electrical current is produced or utilized for lighting, heating, or for power, for the purpose of ascertaining violations of any of the provisions of sections 1-719 to 1-723: and upon finding any devices aforesaid defective or dangerous shall cause to be delivered a written notice of any violation of any provisions of said sections, or of any regulation of said Commissioners duly adopted, to the constructing contractor, owner, or agent of any building directing him or them to remove or amend the same

within a period to be fixed in said notice; and in case of neglect or refusal on the part of the party so notified to remove or amend the same within the time and in the manner prescribed by the chief inspector of electrical work, and approved by the Commissioners of the District of Columbia, the party so offending shall pay a fine of not more than $25 for each and every day's failure or neglect to remove or amend the same after being so notified, and in default of payment of such fine such persons shall be confined in the workhouse of the District of Columbia for a period not exceeding one month; and all prosecutions under sections 1-719 to 1-723 shall be in the District of Columbia Court of General Sessions, in the name of the District of Columbia. (Apr. 26, 1904, 33 Stat. 307, ch. 1602, § 2; Apr. 1, 1942, 56 Stat. 190, ch. 207, § 1; July 8, 1963, 77 Stat. 77, Pub. L. 88-60,§ 1.)

§ *1-721. Electrical engineer—Appointment—Qualifications—Assistant inspectors.*

There is hereby established, under the direction of the Commissioners of the District of Columbia, the office of electrical engineer, and the Commissioners of said District are hereby authorized and directed to appoint an electrical engineer, and said electrical engineer shall be an expert electrician, possessing a thorough knowledge of the most modern methods for the production, use, and control of electricity and electrical apliances, construction, wiring, and insulation, as well as such executive ability and adaptability to office work as is requisite for the efficient management of the said office. And the Commissioners are authorized and directed to appoint two electrical inspectors to assist in the work required by the authority of sections 1-719 to 1-723, who shall * * *

§ *1-723. Connecting current before inspection—Penalty—Authority to remove connection.*

It shall be unlawful for any person, company, or corporation generating current for electric light, heat, or power in the District of Columbia to connect its

system and furnish current for electrical purpose to any building or premises, the wiring of which shall not have been inspected and approved by the chief inspector of electrical work.

Any person, company, or corporation violating the provisions of this section shall, upon written notice from the chief inspector of electrical work to do so, immediately remove said connection and cut off the current, and shall not again supply said current until authorized by the said inspector. For failure to comply with said notice the offending person, company, or corporation shall be fined not less than $5 nor more than $100 for each and every day's failure or neglect to remove said connection and to cut off the current.

The chief inspector of electrical work is hereby authorized and empowered, with the approval of the commissioners, to cause said connection to be removed and the current cut off upon such failure of the offending person, company, or corporation, and to refuse to permit said connection to be replaced and the current to be used until the wiring shall be put in proper and safe condition. (Apr. 26, 1904, 33 Stat. 307, ch. 1602, § 4.)

16 D.C. Code, 2701, provides as follows:

§ *16-2701. Liability—Damages—Prior recovery as precluding action.*

When, by an injury done or happening within the limits of the District, the death of a person is caused by the wrongful act, neglect, or default of a person or corporation, and the act, neglect, or default is such as will, if death does not ensue, entitle the person injured, or if the person injured is a married woman, entitle her husband, either separately or by joining with the wife, to maintain an action and recover damages, the person who or corporation that is liable if death does not ensue is liable to an action for damages for the death, notwithstanding the death of the person injured, even though the death is caused under circumstances that constitute a felony.

The damages shall be assessed with reference to the injury resulting from the act, neglect, or default causing the death, to the spouse and the next of kin of the deceased person; and shall include the reasonable expenses of last illness and burial. Where there is a surviving spouse, the jury shall allocate the portion of its verdict payable to the spouse and next of kin, respectively, according to the finding of damage to the spouse and next of kin. If, in a particular case, the verdict is deemed excessive the trial judge or the United States Court of Appeals for the District of Columbia Circuit, on appeal of the cause, may order a reduction of the verdict. An action may not be maintained pursuant to this chapter if the party injured by the wrongful act, neglect, or default has recovered damages therefor during his life. (Dec. 23, 1963, 77 Stat. 596, Pub. L. 88-241, § 1.)

STATEMENT OF THE CASE

The petiitoner, Shirley A. Thomas, as Administratrix of the Estate of Donald E. Thomas, her deceased husband, instittued an action against the respondent in the United States District Court for the District of Columbia, to recover damages, under the wrongful death statute of the District of Columbia pursuant to D. C. Code 16-2701.

Petitioner, John F. Wynn, Jr., likewise instituted an action against the respondent in the United States District Court for the District of Columbia to recover damages for the personal injuries suffered by him as a result of the same occurrence which caused the death of the said Donald E. Thomas.

Both actions were consolidated for trial. By Order of the District Judge the issues of liability and damages were separately tried before the same jury. The jury rendered its first verdict in favor of petitioners on the liability issue. By a second verdict the jury assessed damages on behalf of the Petitioner, Shirley A. Thomas, as damages for the wrongful death of her decedent, Donald E. Thomas, in the

amount of $156,225.00. The same jury rendered a verdict in favor of the petitioner, John A. Wynn, Jr., assessing damages in the amount of $28,000.00. The District Court Judge by its Order and Judgment denied the Respondent's Motions for Judgment non obstante veredicto and reduced the amount of the judgment assessed by the jury in behalf of the Petitioner, Shirley A. Thomas, to $91,225.00. The respondent filed its appeal to the United States Court of Appeals for the District of Columbia Circuit on the issue of liability. Petitioner, Shirley A. Thomas, filed her appeal to the appellate court objecting to the reduction of the verdict by the District Court Judge. The appeals were consolidated for all purposes before the United States Court of Appeals for the District of Columbia Circuit.

By Act of Congress, the District of Columbia, a municipal corporation, is authorized and directed "to conduct or direct" a comprehensive program of recreation, to include, among other facilities, recreation centers and swimming pools for the citizens of the District. [See D. C. Code, § 8-201, *et seq.*] Certain Federal properties were made available to the District; it was agreed that Banneked Recreation Center stands should be so used. In addition to a swimming pool, bath house and two playing fields, there is a two-story building providing community center activities, such as classes in crafts and skills, in the upper stories, the pump and filtration system being in the basement. The respondent, through its Recreation Board, operates Ninety-five (95%) Per Cent of all of the activities, exclusively. Housekeeping of the swimming program, only available during June, July and August, curiously, is dived as to operation and expense. Government Services Administration, a private, nonprofit corporation, by lease arrangement with the National Capital Park Service, undertakes to provide maintenance for the swimming pool. The Recreation Board and G.S.A., by intermural understanding since 1948, have divided the daily use of the pool; the Recreation Department offering free lessons in the morning hours, G.S.A. permitting swimming in the after-

noon to the general public at a small charge. Petitioner's intestate and co-petitioner's, Wynn, served as lifeguards, both morning and afternoon; each sponsor carried the appellees on their individual payrolls, and they were paid by each, at the same rate. Also, while appellant provided the water, G.S.A. chlorinated it prior to release into the pool itself, thereby increasing the hazard. There was but one (1) electrical service and system, controlled by one (1) panel.

Prior to 1950, respondent, by Congressional mandate, was charged with the duty of regulating electric power, as a public utility, and the statutory office of Electrical Inspector was established to police and to secure compliance with minimum standards of safety embodied in the Electrical Code of the District of Columbia and regulations of the Public Utility Commission. (D.C. Code 1-719 et seq. 33 Stat. 306) In addition, Congress made it a criminal offense to connect electrical current to ANY building before the Electric Inspector had approved its wiring. During 1950, it became necessary to 'heavy-up' the electrical system, and, in addition, it was proposed to renew the wiring to the underwater lights in the pool. *This decision post-dated a prior electrocution at the pool.* Plans for this 'heavy-up' and rewiring were distributed to the Recreation Department. The size of the "a circuit breaker", (a safety device brought into play when a short circuit occured) was reflected in the plans, but it was inadequate for the purpose, according to the standards, fixed by the National Electrical Code and the Electrical Code of the District of Columbia. Nevertheless, the wiring and circuit breaker, below said standards, were installed; they, were never inspected by appellant, or its Electrical Inspector. The electrical service was connected to the 'heavy-up' and rewiring just as if they had been inspected and approved, despite the statutory prohibition.

The electrical service which was brought into the two-story building supplied the electricity for the building itself

and for the swimming pool and the playing fields, all of which comprised a single electrical system. The electricity throughout the entire Recreation Center was distributed through a single panel box. It was necessary to revise and renovate the electrical system at the swimming pool at the time the baseball field was constructed in 1950.

On August 1, 1960, while petitioner, Thomas intestate, and co-petitioner, Wynn, were on duty as lifeguards, and the public was utilizing the pool for swimming, an alleged 'independent contractor' employed by G.S.A., Inc., was making 'repairs' to the electrical system, and his eleven (11) year old son, who was assisting him, through some misadventure, activated the underwater lights in the pool. Due to water rot, the insulation on the wiring at the underwater light had deteriorated to such an extent that a short circuit developed. But, because the wiring to the circuit breaker was too large and the installation was below minimum safety standards, the wires burnt in half before the circuit breaker was tripped. As a result, the current, now uncontrolled, found appellant's water—its conductivity stepped-up—a ready conduit, and this lethal electrical force went rampaging into the swimming pool in search of the nearest 'ground', which was located near the middle of the pool on its bottom. *An infant swimmer, and lifeguard Thomas,* who went to resuce him, were both electrocuted. Co-petitioner, Wynn, who sought to reach them, was severely shocked. A post-morten inquiry and report by the Police Department revealed that the underwater light involved was half full of water and the insulation had rotted at the site of the short circuit. The rubber hose protecting the electric wiring had rotted in part by a gradual process of deterioration which was estimated to have taken from two to five years. If proper maintenance and inspection had been performed, the dry rotted rubber hose would have been discovered and replaced. Seepage of water took place and the underwater electric light fixture which had developed the short circuit became partially filled with water causing the wire insulation to become rotted and deteriorated

allowing a short circuit to occur. Tests by the power company showed that the water between the light and the ground on the bottom of the pool was charged with a dangerous electrical force. The pretrial statement and evidence adduced by the petitioners showed that they claimed the following items of negligence:

> 1. The Circuit breaker designed to prevent uncontrolled dispersal of electrical current in the event of a short circuit was not the proper size required by the District of Columbia Code and the National Electrical Code.
>
> 2. The circuit breaker was not located on the poolside of the recreational center but was part of the single electrical panel servicing the entire recreational area, whether the pool was operating or not.
>
> 3. The respondent admitted that it never inspected the devices and installations although it had the proposed plans showing the defective devices prior to the time the Center, and the pool were "heavied up".
>
> 4. The District, although it knew or should have known of the defective and forbidden connection of electrical current thereto, neglected to disconnect the same but actually used the same and invited the public to do so despite its dangerous condition.

The respondent offered no evidence, made no objection to evidence or the Court's charge and on appeal rested its complaint on two grounds:

> (1) That since it did not own the land and was not operating the pool at the time of the accident it had no ilability.
>
> (2) At any event its activities were in pursuit of a governmental function.

The appellate Court below, ignored the evidence of claimed negligence and the respondents connection with the swimimng program it engaged upon and which Congress commanded, and asserted that since the wire that

burned out, which was too small to trip the circuit breaker and was located on the pool portion of the center, which Government Services Inc. operated for the public under a lease arrangement, and respondent was under no justiciable obligation to the petitioners.

THE DAMAGE QUESTION

The appellate Court below never reached the question involved in the reduction of damages assessed by the jury. The trial Court, acting sua sponte, because the respondent refused to move for a new trial, and under the provision of Title 16, -2701 of the D.C. Code, reduced the damages assessed by the jury for the petitioner Thomas from $156,225.00 to $91,225.00, because he said that then jury did not take into consideration such items as the "buffeting of fate" and the uncertainties of life and health. This was not done within ten (10) days of the verdict but under the assumption that the statute authorized the trial Court to do so at any time. The evidence, however, showed that all of the factors urged were offered to the jury by evidence through the testimony of an expert, who then reduced his findings to present value.

ARGUMENT

I.

Constitutional Limitation and Conflict with the Decisions of this Court.

The decision of the Court of Appeals in reversing the judgments appealed from by the District of Columbia, is not within the constitutional power of that court and is in conflict with the decisions of this court.

The Seventh Amendment to the Constitution provides that "no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

Decisions of this Court

From its first decision dealing with this question, *Parsons* v. *Bedford*, 3 Pet. 433 (1830), to its most recent opinion touching upon it, *Neese* v. *Southern Ry Co.*, 350 U.S. 77 (1955), this Court has uniformly held that the appellate courts of the United States are prohibited by the Amendment from interfering with any finding of fact made by a jury and approved by the trial court. In *Parsons* v. *Bedford*, the principle was stated by Mr. Justice Story (447-448):

> "But the other clause of the amendment is still more important, and we read it as a substantial and independent clause. 'No fact tried by jury shall be otherwise re-examinable in any court of the United States than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. . . . The only modes known to the common to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings."

Since this respondent did not move for a new trial or present any error bearing resemblance to the one erected by the appellate Court, it could only have reached its conclusion by re-examining the pleadings, while ignoring the pretrial order and evidence adduced in proof thereof, and then restating the issue it selects from the record. This amounts to no more or less than a search for one possible view of the case which will make the jury's finding inconsistent and results in a collision with the seventh amendment. *Arnold* v. *Panhandle S. F. Ry. Co.*, 353 U.S. 360. The consistent objection of Justices who complain that cases in this Court involving re-weighing evidence rather than guaging the reach of the Seventh amendment highlights the need for an expression that

will serve cases in general. Had the Court looked for evidence to sustain the jury's verdict as it plainly does in FELA cases, *Lavender* v. *Kurn*, 327 U.S. 645, no such appellate frolic would be possible. As a result there is conflict in the circuits as to whether the criterion asserted in the *Lavender* case is the proper measure. *Preston* v. *Safeway Stores*, 163 Fed. Supp. 749 (1958), affirmed, but discounted as to the applicability of the *Lavender* case, *Safeway* v. *Preston*, 106 U.S. App. D.C. 114, 269 F.2d 781. But see the 8th Circuit which cites Judge Holtzoff's District Court opinion with approval nearly ten years later, *Mizel* v. *Fields*, 386 F.2d 718 (1967), and the 5th Circuit, *Planters Mfg.* v. *Protection Mut. Ins. Co.*, 380 F.2d 869 (1967). It would seem that the aid of this Court is the only answer to this recurring problem.

> "So few of these cases come to this Court, that, as a matter of fact, the judges of the District Courts and the Circuit Courts of Appeal are the primary custodians of the Amendment." *Galloway* v. *United States*, 319 U.S. 372.

II.

Where Congress has Imposed, by Statute the Duty, to Conduct Public Swimming Program Can the District Ignore Its Obligations Without Liability for Resultant Damage.

Congress, by statute, (April 29, 1942, 56 Stat. 261, Ch. 265), created for the District of Columbia, a Recreation Board, and authorized that Board to *conduct or direct* a comprehensive program of public recreation to include, among other facilities, recreation centers and swimming pools for the citizens of the District of Columbia (D.C. Code 8-201 et seq.). This Act authorized the Recreation Board to utilize for such purposes those public properties designated by the National Capital Planning Commission as being suitable and desirable units of the District of Columbia recreational system (D.C. Code 8-210). Pursuant

to this authorization the Recreation Board undertook to operate recreation centers and swimming pools in the District of Columbia. One such establishment is the Banneker Recreation Center, located on land belonging to the United States, and consisting of two playing fields, a swimming pool and a two-story building. These had been constructed by the National Capital Park Division of the National Park Service of the Department of Interior. The Recreation Board conducted a large number of activities at this Recreation Center and, (except for the dual operation of the swimming pool, during June, July and August) maintained exclusive control and jurisdiction over the *entire* Center all year round, pursuant to the powers vested in it by Congress (D.C. Code 8-201 et seq.). Thus the entire recreation center, including the swimming pool, was a public area being operated by the Recreation Board pursuant to the powers vested in it by Congress. The Board therefore by assuming the responsibility of providing recreation became chargeable with the duty of exercising due care to caintain the entire recreation establishment in a reasonably safe condition.

This is not a situation which was treated by this Court in *Universal Interpretive Shuttle Corp.* v. *Wash. Metro. Area Transit Co.*, 80 Sup. Ct. 354 (1968), where the enabling statutes and the intention of Congress was shown to have left the mall under the Secretary of Interior. Here the statute places the duty and responsibility for the conduct of swimming on the respondent by statute. This statute displaces the Park Service from its duties about public swimming in the District. *Weightman* v. *Washington*, 1 Black (U.S.) 39, 17 L. ed. 52.

III.

Responsibility for Making Inspections of Electrical Devices Is Upon the Respondent.

The court below has overlooked an important facet of this case. The statutory mandate of the Congress (1

D.C. Code 719 et seq.) imposed upon the respondent the duty to make inspections of electrical devices and to prevent the supplying of electricity to any facility which did not meet respondent's standards. The fact that the instant installation was constructed by the federal government is immaterial. At the time the present electrical devices were being used, it was being used jointly by the respondent and another agent, namely, Government Services, Inc. One of the excuses offered by the respondent in its failure to inspect this recreational installation was an assumption on its part that it was prohibited from making any inspections on federal installations. We can find no Congressional statute or any other basis for the assumption reached by respondent that it was prohibited from making such inspections. We can find no case law on this subject. It was noted by the court below in footnote No. 5 of its opinion, that the respondent had taken the position that it had "no authority to go on federal property to inspect". Petitioners state, even assuming arguendo, if the respondent had no authority to go on federal property to inspect, then at least the respondent did have authority to withhold the supplying of electrical current to any installation unless it had assured itself that such electrical installation had met its standards pursuant to the responsibility placed upon it under 1 D.C. Code, Secs. 719-723 which placed such statutory responsibility to inspect electrical wiring generally upon the respondent and its agencies.

This responsibility charged respondent with the responsibility to insure the safety not only of District residents but the seat of the government. The least that could be expected was that the respondent could have refused to participate. But even if such refusal were not possible without insubordination, it should had refrained from lending its prestige to buttress the false notion that the pool was safe, at anytime. In essence it leaves not only the property of District residents but the Federal

installations wholly without protection the Congress certainly envisioned. *Detroit-Edison* v. *Ewing*, 122 F.2d 82.

IV.

Provision of 16 D.C. Code 2701 Authorizing the Trial Judge to Order a Reduction of the Verdict if the Verdict Was Deemed Excessive in a Case Brought Under the Wrongful Death Action Statute Is Violative of the Seventh Amendment.

The District of Columbia counterpart of Lord Campbell's Act, D.C. Code Sec. 16-2701, contains in part the following provision:

> "If, in a particular case, the verdict is deemed excessive the trial judge or the United States Court of Appeals for the District of Columbia Circuit, on appeal of the cause, may order a reduction of the verdict."

It appears that the above statutory provision, as applied, is violative of the Seventh Amendment. The statutory provision contemplates that the trial judge or the U.S. Court of Appeals may order a reduction of verdict rendered by a jury. The part of the order of the trial court in reducing sua sponte the amount of the jury verdict without a motion for a new trial, violates the Seventh Amendment and is in conflict with this Court's decision in *Arnold* v. *Panhandle S. F. Ry. Co.*, 353 U.S. 360.

V.

Respondent Is Responsible for the Existence of a Nuisance Irrespective of any Duty Imposed Upon It to Exercise Reasonable Care in Such Maintenance.

Petitioners submit that the condition which prevailed at this swimming pool, namely, the defective underwater electric light fixture falls within the category of a nuisance. It is well established that the respondent would be responsible to petitioners if the condition complained

of constituted a nuisance. This responsibility is separate from the allegation of negligence charging the respondent with failure to maintain the recreational facility in a reasonably safe condition.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted, the judgment of the Court of Appeals reversed in all respects, and the verdict of the jury in toto be reinstated.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,091

DISTRICT OF COLUMBIA, APPELLANT

v.

SHIRLEY A. THOMAS AS THE ADMINISTRATRIX OF THE ESTATE OF DONALD B. THOMAS, APPELLEE

No. 21,092

DISTRICT OF COLUMBIA, APPELLANT

v.

JOHN F. WYNN, JR., APPELLEE

No. 21,126

SHIRLEY A. THOMAS AS THE ADMINISTRATRIX OF THE ESTATE OF DONALD B. THOMAS, APPELLANT

v.

DISTRICT OF COLUMBIA, APPELLEE

Appeals from the United States District Court for the District of Columbia

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Decided August 23, 1968

Mr. John R. Hess, Assistant Corporation Counsel for the District of Columbia, with whom *Messrs. Charles T. Duncan*, Corporation Counsel, *Hubert B. Pair*, Principal

Assistant Corporation Counsel, and *Richard W. Barton*, Assistant Corporation Counsel, were on the brief, for appellant in Nos. 21.091 and 21,092 and appellee in No. 21,126.

Mr. I. Irwin Bolotin, with whom *Messrs. Philip L. Lesser* and *Gerald Herz* were on the brief, for appellee in No. 21,092.

Mr. Henry Lincoln Johnson, Jr., for appellant in No. 21,126 and appellee in No. 21,091.

Before EDGERTON, *Senior Circuit Judge, and* BURGER and MCGOWAN, *Circuit Judges.*

MCGOWAN, *Circuit Judge*: These appeals are the issue of a tragic accident which occurred at about 3:30 in the afttrnoon of August 1, 1960, in the swimming pool located at the Banneker Playground in the District of Columbia. Two lifeguards went to the aid of a swimmer in difficulty because of electric current suddenly coursing through the water. The swimmer was killed, as was one of his would-be rescuers. The other guard was injured. In Nos. 21,091 and 21,092, the District of Columbia appeals from awards in the District Court of damages against it in favor, respectively, of the estate of the deceased lifeguard, and of the guard who survived.[1] In No. 21-126, the first of these appellees complains of the District Court's reduction in amount of the damage award made to it by the jury. We do not reach the questions presented by this last appeal because we have been unable to find any adequate basis for the imposition of liability upon the District of Columbia. We have, accordingly, concluded that the judgments against it must be set aside.

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[1] It appears that the estate of the deceased swimmer sued the United States, Government Service, Inc., and the District of Columbia. The complaint against the District was dismissed before trial with the consent of all parties, and the other defendants effected a settlement.

I

The two lifeguards involved in the accident, Thomas and Wynn, were employed as such by Government Services, Inc., a private non-profit corporation which has leased and operated the pool since its initial construction in 1934 by the National Capital Parks Division of the United States Department of the Interior. From 1948 to 1950 the Banneker recreation area—then, as now, situated on land owned solely by the United States—was renovated and new facilities were added. The swimming pool, for example, was completely rewired at that time. At about the same time the entire recreation area, except for the swimming pool, was turned over by the United States to the District of Columbia for management and operation. Government Services, Inc., continued to be the lessee-operator of the pool, with responsibility for its inspection and maintenance. It provided janitorial service, and its own manager was present whenever the pool was in use.

The pool was open three months a year, with admission to the public on a fee basis. The playground area generally was operated the year around by the District. One of the recreational activities sponsored by the District in the summer time was the giving of free swimming lessons on weekday mornings from 9:00 to 12:00. During these hours, the District was required to provide its own lifeguarding service. It did this by hiring, for these hours alone, the regular guards employed by Government Services, Inc. Payment for these services was made directly to the gards by the District. This was the only responsibility for management and operation in respect of the swimming pool assumed by the District during its limited use of the pool.

The accident did not occur in the morning during the District's swimming lesson period. It happened in the afternoon, and it was caused by defective wiring in the underwater lighting system. Water seeping into a light-

ing installation had rotted the insulation, causing the return wire to burn out. The first segment of this wire immediately attached to the lighting installation was too small under code standards, and, for this reason, it burned out before it could trip the circuit braker.[2]

To carry out its pool maintenance and inspection responsibilities in the electrical field, Government Services, Inc., retained an independent electrical contractor. He had inspected the light fixtures and replaced bulbs only a few days before the accident, but had not reported any defective wiring. The pool underwater lights had, at the time of the accident, been inadvertently turned on in the daytime by the electrician's young son, who was helping his father repair lights in the pump house.

Since the accident occurred in the course, and by reason of, their employment, Thomas and Wynn were compensated by Government Services, Inc., as required by the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 1964), which Congress has made applicable to private employment in the District. 36 D.C. Code 501 (1967). Suits were brought, in addition, against Potomac Electric Power Company and the District of Columbia.[3] A verdict was directed for the former at the close of all the evidence, but this relief was denied the District. The jury verdicts followed, and the District's motions for judgment notwithstanding were denied.

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[2] The circuit breaker was located in the basement of the bath house which was part of the pool operation handled by Government Services, Inc. A No. 8 wire cable wen from the circuit breaker down to the junction box at the side of the pool. From this point to the lights there ran the inadequate No. 16 wire. The upper floor of the bath house was devoted to adult recreational uses under the direction of the District.

[3] At the instance of Wynn, the electrical contractor hired by Government Services, Inc., and the latter's workmen's compensation carrier were joined as defendant's but the suit was dismissed as to both prior to trial.

II

The District Court thought to find a foundation for the District's liability in the circumstance that it maintained "an establishment of a public nature to which it invites the public;" and it characterized the management of the pool as a "dual operation" since "during the morning hours the pool was operated by the District of Columbia." This latter characterization is not borne out by the record facts. The District provided lifeguards during the dree swimming classes offered by it on weekday mornings but its management or supervision of the pool did not extend beyond this. It cannot, upon any principle of actual control or operation, be regarded as having exercised such control over the pool in the morning as to make it answerable for an accident occurring in the afternoon.

The District Court, as its first formulation implies, seems to have rested mainly upon a theory that, because the pool was located in a recreational area both apparently and actually operated in large part by the District, one using the pool might have conceived of himself as an invitee of the District and assumed that the District was taking due care for his safety. This approach would certainly have much to be said for it in the case of one injured while attending the District-sponsored swimming lessons in the morning. One who encourages others to attend functions or to use facilities need not always have actual control in order to be held liable for injuries suffered by those who respond affirmatively to such encouragement. *See Watford* v. *Evening Star Newspaper Co.*, 93 U.S. App. D.C. 260, 211 F.2d 31 (1954).

One who gives a dance in a hotel ballroom may possibly be liable to his guests for the unsafe condition of the premises, but he hardly remains liable to the guests of the hotel on the succeeding evening. And this proposition need not be couched in the familiar terminology of invitors and invitees in order to command assent. It

simply would not be rational, in terms of normal expectations and reliances, to project a liability so broadly.[4]

It is unquestionably true that the legal relationships at Banneker are somewhat tangled because of the special and dominant connection which the United States has long maintained *vis-a-vis* the swimming pool. The record here is not too informative as to what impressions an afternoon or week-end paying patron of the pool might have entertained with respect to which unit of government he was doing business with. There is no occasion to say now that under no circumstances could such a person have rationally expected that the District of Columbia was responsible for the safety of his swim.

But we do not deal here with such a member of the public. Both Wynn and Thomas were employees of Government Services, Inc., and they were on th epremises at the time of the accident because of this relationship—not because they had bought a ticket for a swim in a recreational facility which might plausibly be thought by an outside patron to be under the aegis of the District of Columbia. There is nothing in this record to suggest that Thomas and Wynn did not understand their employer's relation to the pool as compared with the District's or that they were unaware that injuries in the course of their employment would be compensable under the law applicable to their employment relationship with Govern-

[4] The significance of apparent relationships may be greater where the issue is not the degree of care owned but whether there is any basis at all for constructing a duty. *Compare Levine* v. *Katz*, No. 21,145 (D.C. Cir. decided May 14, 1968). In any event, the finding of a duty here necessarily involves a review of the evidence with respect to the District's actual control of the pool, as well as the inferences with respect to the District's responsibilities for safety which could be reasonably drawn by the pool employees of Government Services, Inc. To conclude that inferences as to the District's responsibility for safety might be more rational in the case of paying patrons is certainly to explore the concept of invitation. In any event, the end result is always a reflection essentially of what seems reasonable under all the circumstances.

ment Services, Inc. There is certainly nothing to indicate that they relied upon any supposition that the District of Columbia provided an additional source of compensation for work-connected injuries.

The record indicates to us that the District had no actual control or responsibility relevant to the cause of the accident. And, at least insofar as pool employees of Government Services, Inc., are concerned, it fails to provide the wherewithal to construct, in all reasonableness, a duty derived from appearance rather than reality.[5]

The judgments appealed from by the District of Columbia in Nos. 21,091 and 21,092 are reversed; and the appeal in No. 21,126 is dismissed as moot.

It is so ordered.

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[5] Appellee Wynn, although not appellee Thomas, urges that affirmance may rest upon the District's failure to discharge its statutory responsibilities to inspect electrical wiring generally. 1 D.C. Code §§ 719-23. This was not, however, the theory upon which the claims were brought, tried, or submitted to the jury. Thomas' complaint says nothing on this score, and Wynn's complaint charge the District only with "failing to make and/or require proper and adequate inspections of the electrical system, including the equipment and fixtures at said swimming pool . . . ." That this was a reference to the District's alleged duty arising from its relationship to this particular pool seems clear from Wynn's assertion at the pretrial proceedings

> that Banneker Swimming Pool was a public recreation facility in the District of Columbia, and therefore the District of Columbia had a duty to see that it was maintained in a safe condition for use by the public.

In his opening statement at trial Wynn's counsel alluded to the fact that the District had not inspected the installation "although the District has the only inspection authority in the Disric of Columbia auhorized to make inspections." The District's counsel rejoined that the District had no "authority to go on federal property to inspect." The trial judge repeatedly announced throughout the trial, with the seeming concurrence of appellees' counsel, that under the law "District of Columbia inspectors don't inspect Federal buildings." Whether this is true in law or fact, no evidence was offered by appellants on this point or on any basis which would support this theory of liability.

APPENDIX B

No. 1955-61

No. 330-62

[Filed May 11, 1967]

ORDER AND JUDGMENT

This matter came before the Court on the motion of the defendant District of Columbia for judgments *non obstante veredicto* and the opposition of the plaintiffs thereto, and oral argument of counsel in open court.

The Court has given due consideration to the several points and authorities urged upon it by the defendant and concludes that the defendant is not entitled to judgment *non obstante veredicto.*

The Court has given consideration to the amount of damages awarded in the two cases and reaches the following conclusions:

In the case of *John F. Wynn, Jr.* v. *Potomac Electric Power Co., et al,* Civil Action No. 330-62, the defendant District of Columbia asked neither for a new trial nor that plaintiff consent to a remittitur. It elected to apply only for judgment *non obstante veredicto.* In the light of these considerations the verdict of $28,000.00 in favor of the plaintiff Wynn must stand.

In the case of *Shirley A. Thomas, Administratrix* v. *Potomac Electric Power Co., et al,* Civil Action No. 1955-61, being an action for wrongful death, the Court, under the provisions of D.C. Code 16-2701, Supp. V 1966, if the verdict is deemed excessive, may order a reduction of the verdict. The Court does deem the verdict of $155,000.00 excessive for the reasons set out in its opinion. The Court deems a verdict of $90,000.00 to be appropriate with the following allocations: to the widow Shirley A. Thomas $55,000.00 with an allowance of $1,225.00 for funeral expenses; to the son Donald E. Thomas, Jr., $14,500.00; and

to the son Martin Thomas, $20,500.00. The awards to the two sons, who are minors, is to be paid to guardians to be appointed through the Probate Division of this Court.

The Court finds that the orders and judgments heretofore entered in these cases are in error in that they order interest to be paid on the amounts of the judgments from the date of entry until paid at a rate of *six* percent (6%) per annum, whereas, D.C. Code 28-2701, 1961 edition, provides "That interest, when authorized by law on judgments against the District of Columbia, shall be at the rate of not exceeding four per centum per annum." They must, therefore, be set aside.

For the foregoing reasons it is, by the Court, this 11th day of May, 1967,

ORDERED, that the orders and judgments heretofore entered herein be, and the same hereby are, set aside.

FURTHER ORDERED, that the motion of the defendant District of Columbia for judgments *non obstante veredicto* be, and same is hereby denied.

FURTHER ORDERED, that the plaintiff, John F. Wynn, Jr., recover from the defendant, the District of Columbia, the sum of $28,000.00 with interest thereon at the rate of 4 per centum per annum from March 17, 1967, as provided by law.

FURTHER ORDERED, that Shirley A. Thomas, widow of Donald E. Thomas recover from the defendant, the District of Columbia, the sum of $56,225.00; that Donald E. Thomas, Jr. recover from said defendant the sum of $14,500.00; that Martin Thomas recover the sum of $20,500.00; all recoveries to be with interest at 4 per centum per annum from March 17, 1967; and that the sums to be recovered by Donald E. Thomas, Jr., and Martin Thomas shall be paid to guardians to be appointed for them through theProbateDivision of this Court.

ALEXANDER HOLTZOFF,
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1968

Filed Oct. 10, 1968, United States Court of Appeals for the District of ColumbiaCircuit, Nathan J. Paulson, Clerk

Civil 1955-61
No. 21,091

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SHIRLEY A. THOMAS AS THE ADMINISTRATRIX OF THE ESTATE OF DONALD B. THOMAS, APPELLANT

v.

DISTRICT OF COLUMBIA, APPELLEE

Before: Edgerton, Senior Circuit Judge; and Burger and McGowan, Circuit Judges, in Chambers.

ORDER

On consideration of the petition of appellant, Shirley A. Thomas, for rehearing and of the petition of appellee, John F. Wynn, Jr., for rehearing, it is

ORDERED by the Court that the aforesaid petitions for rehearing are denied.

Per Curiam.